

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 06-0259
Gross Retail Sales Tax
For the Years 2001 through 2005

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Best Information Available Audit Assessment – Gross Retail Sales Tax.

Authority: IC § 6-8.1-5-1(a); IC § 6-8.1-5-1(b); 45 IAC 15-5-1.

Taxpayer argues the Department of Revenue's assessment of gross retail tax – based upon an audit review of the "best information available" – overstated the taxpayer's sales figures for the years in question and that information taxpayer provided subsequent to the audit more accurately reflects the total amount of sales.

STATEMENT OF FACTS

Taxpayer operated an Indiana restaurant as a sole proprietorship from 2000 through 2005. On July 1, 2005, the restaurant began operating as a "sub-chapter S corporation." Taxpayer filed sales tax returns for periods ending July 31, 2001, through December 31, 2002, on April 11, 2005. Taxpayer also filed a sales tax return for the period ending October 31, 2001, on March 31, 2003.

The Department of Revenue (Department) conducted an audit review of taxpayer's business records and sales tax returns. According to the audit report, taxpayer was unable to provide original source records because "all records in his possession had been destroyed in a fire." During the preparation of the audit report, the Department attempted to obtain information from taxpayer's accountant but the accountant was "unresponsive."

The final audit report – completed March 2006 – resulted in the imposition of additional gross retail (sales) tax. Taxpayer's representative submitted a protest on the grounds that taxpayer's sales were "significantly lower than what was estimated on the audit." The protest was assigned to a Hearing Officer, and an administrative hearing was scheduled for November 17, 2006. Neither taxpayer nor taxpayer's representative chose to participate in the hearing. However, taxpayer's representative submitted documentation purporting to "represent[] his best estimate of total sales from July 1, 2001 to June 30, 2005." This Letter of Findings has been prepared based upon the information contained within the March 2006 audit report and upon the information taxpayer subsequently presented.

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DISCUSSION

Taxpayer argues that the Department's assessment of additional sales tax for 2001 through 2005 was excessive. Taxpayer does so in the belief that its own bank records demonstrate that the total restaurant sales for the years in question were substantially lower than the amount determined by the Department.

During the audit review, the Department requested original sales records. Taxpayer failed to provide those records on the grounds that the records had been "destroyed in a fire." The Department requested that taxpayer obtain alternative records. According to the audit report, taxpayer's accountant was "unresponsive" and that although "taxpayer was given ample time to contact his accountant to obtain records for the audit . . . no records of any kind were ever made available."

In the absence of original records, the audit report was concluded based upon the "best information available." That "best information available" included the number of taxpayer's full and part-time employees, wage data obtained from a "Metropolitan Area Occupational Employment and Wage Estimates" report published by the Bureau of Labor Statistics, and information obtained from the community in which taxpayer's restaurant business was located.

In addition, the audit relied upon data published on the "BizStats" website "to apply operating ratios to the attributed wage expense to arrive at attributed sales." The data contained within that website was obtained from the "National Averages for all US Sole Proprietorships for Eating and Drinking Establishments."

The Department prepared the sales tax assessment based upon authority contained within IC § 6-8.1-5-1(a) which states that "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available." *See also* 45 IAC 15-5-1.

Taxpayer has provided numerous bank records for the years in question. In addition, taxpayer's representative has prepared an "Estimated Sales Recap" for 2002 through 2005 to "estimate sales for this period of time." Based upon, the bank records and the summaries, taxpayer's 2001 through 2005 sales were substantially less than the amount indicated on the audit report.

Taxpayer bears the burden of establishing that the audit report erred in its conclusion. IC § 6-8.1-5-1(b) states that, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The taxpayer has the obligation to prepare a careful, methodical, and detailed factual presentation of the evidence sufficient to refute the conclusions contained within the initial report. In order to meet its burden, it is incumbent upon the taxpayer to "walk" the Hearing Officer through each element of the taxpayer's proffered evidence; taxpayer does not meet its burden by presenting numerous records or conclusory statements in the hope that those records or statements will speak for themselves.

The Department is unable to conclude that the records sufficiently refute the information or the results reached in the original report.

FINDING

Taxpayer's protest is respectfully denied.

DK/DP/BK – December 4, 2006.